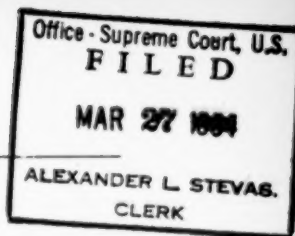


No. 83-1364.

**In the  
Supreme Court of the United States.**



OCTOBER TERM, 1983.

GERARD COLBY ZILG,  
PETITIONER,

v.

PRENTICE-HALL, INC.,  
RESPONDENT.

**Petitioner's Reply Brief.**

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Prentice-Hall attempts to banish the constitutional issue from this case by arguing that all the Court of Appeals was really doing was reversing errors of state law. The Appeals Court's decision, however, cannot be explained away so easily.

First, despite references to best efforts, the district court's decision and its memorandum denying summary judgment applied the good faith standard. Second,

the Appeals Court did not say it was reversing on a burden of proof issue. It simply made an independent finding--contrary to the trial court's--that Zilg had not produced evidence that the publisher was motivated by other than good faith business judgment.

Prentice-Hall's failure to address the First Amendment issue does not make the issue disappear. The essential fact remains that the Appeals Court's reversal was based on its independent judgment about marketability--a judgment explicitly based on the book's viewpoint and content, and flatly at odds with the district court's determination that the book would have sold 25,000 copies had Prentice-Hall not intentionally withheld sales efforts.

Finally, Prentice-Hall appears to concede that Rule 52(a) was violated, but urges that the Rule is only a

"shibboleth." Brief in Opposition at 17.

This is not a proper construction of the rule. Prentice-Hall's concession requires at least a summary reversal in the event that the Court does not think full briefing and argument necessary.

Respectfully submitted,

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